



Commonwealth of Massachusetts State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-93-20

FACTS:

You are an appointed sewer commissioner in a town (Town). Sewer commissioners have been designated special municipal employees.

You are also the president and principal owner of ABC Plumbing & Heating (ABC). In your individual capacity, you have previously developed several multi-unit residential projects. Presently, you own several undeveloped acres of land in the Town on which you expect to erect residential units in the future.

The sewer commission (Commission) is currently reviewing proposed sewer and water regulation revisions that were drafted by their former executive director. These regulations will govern the construction of all new sewer and water pipes, and the repair of all existing pipes within the Town.

You anticipate that the Commission will soon consider whether polyvinyl chloride (PVC) pipe or copper pipe must be used for water connections. You state that PVC pipe is considerably less expensive for a developer to use than copper pipe. Additionally, you indicate that if the Commission allows the use of PVC pipe, it could require that it be laid in a bed of sand rather than in the existing soil, thereby creating added expense for the developer.

QUESTION:

Does G.L. c. 268A permit you to participate as a Commissioner in a decision to adopt these water and sewer regulations?

ANSWER:

No, unless your appointing authority gives you an exemption under G.L. c. 268A, §19(b)(1).

DISCUSSION:

In your position as a sewer commissioner, you are a municipal employee for the purposes of the conflict of interest law.^{1/} As a result, you are subject to the restrictions set forth in §19, which provides that a municipal employee (including a special municipal employee) may not participate^{2/} as such in any particular matter^{3/} in which to his knowledge he or his immediate family has a financial interest.

In *Graham v. McGrail*, 370 Mass. 133, 139 (1976), the term “financial interest” was interpreted to mean an economic interest that is not shared with a substantial segment of the public. While the Court in *Graham* held that the financial interest implicated by §19(a) is to be distinguished from the interest every member of the Town would have in a particular act or expenditure of the Town,^{4/} the Court also made it clear that an individual’s interest in his own compensation “is unquestionably a financial interest” under §19(a). That financial interest may be of any size, and may either be positive or negative. *See, e.g., EC-COI-89-33; 89-19; 84-96.* If the municipal employee’s direct or reasonably foreseeable financial interest will be affected, the municipal employee must abstain from the matter in question. *See, e.g., EC-COI-89-19; see also Graham v. McGrail*, 370 Mass. at 137-138. The question then is whether you have a direct or reasonably foreseeable financial interest in the proposed revisions to the Town’s water and sewer regulations.

As a real estate developer whose project would be subject to the regulations, you have an obvious financial interest in the Commission's decision whether or not to require the more costly copper pipe or the more costly method of PVC pipe installation. *See, e.g., EC-COI-84-76* (city council member has obvious financial interest in decisions of council with regard to land he proposes to develop); *EC-COI-87-31* (where Board issued permits and licenses concerning the operation of restaurants, Board member has financial interest in Board determinations regarding his restaurant). Thus, §19 would prohibit your participation in the decision whether or not to promulgate these regulations, unless that decision either is not a "particular matter" or is exempt under §19(b)(3) because the decision involves "a determination of general policy," and your financial interest is "shared with a substantial segment of the [Town's] population."^{5/} *See EC-COI-92-34.*

The Commission has long recognized that while "regulations in and of themselves are not particular matters ... the process by which they are adopted and the determination that was initially made as to their validity will be considered particular matters." *EC-COI-81-34; see also 85-11; 87-34.* Therefore, §19 would require your abstention unless we were to conclude that your financial interest in the decision is shared with a substantial segment of the Town's population.^{6/}

In determining whether your financial interest in the promulgation of the proposed regulations is shared by a substantial segment of the Town's population, we look to our most recent application of this statutory language in *EC-COI-92-34*. There we considered whether a Selectman and commercial property owner could participate in a decision to adopt a residential factor that would have the effect of applying a higher tax rate to commercial property than to residential property. In analyzing that question, we first looked to whether the general policy at issue suggested a classification for the segment of the Town's population we were to examine. We concluded, in that case, that the classification was established by the regulation itself — whether the Town resident was a commercial, as opposed to a residential, property owner.

We then sought to determine what percentage of the Town's population fit within the classification and found that 10% of the Town's population were commercial property owners. Noting that the "relevant classification must be one of kind rather than degree," however, we did not seek to determine whether there was a difference among commercial property owners in the degree to which they were financially impacted by the policy.^{7/}

Applying a like analysis in this case, we believe that although the regulations do not establish the relevant classification, the facts you present suggest what that classification consists of, namely, construction businesses — real estate developers, contractors, plumbers, and the like — which will be affected on a regular basis by the regulations. By contrast, homeowners, and businesses unrelated to construction, would be affected only in the rare instance where they install or repair new or existing pipes. Moreover, some homeowners and businesses will never be affected by the regulations.

As in *EC-COI-92-34*, we do not endeavor to determine among construction businesses the difference, if any, in the degree to which the regulations will affect their financial interest. Instead our focus is next directed to determining whether people who own these businesses constitute a substantial segment of the Town's population. Here, we think it safe to assume these business owners represent but a small percentage of the Town's total population.^{8/} Because of this, and because such business owners' ability to earn their livelihood is directly affected by construction costs, we must conclude that, as a real estate developer, your financial interest in the adoption of regulations affecting those costs is not shared by a substantial segment of the Town's population. *See, e.g., EC-COI-83-47* (selectman and commercial shellfisherman may not participate in particular matters concerning the shellfishing industry where his shellfishing license was one of only 200 issued by the Town, and because of the "significance to [his] livelihood"); *see also 84-96* (owner of land abutting proposed development would, by virtue of the location of his property, have a financial interest that was distinct from other citizens).

Since we conclude that your financial interest is not shared by a substantial segment of the Town's population, the only exemption from §19 that is available to you is that contained in §19(b)(1). To qualify for this exemption, prior to participating, you must (1) inform your appointing official of the nature and circumstances of the particular matter; (2) make a full written disclosure to your appointing authority of the financial interest; and (3) receive a written determination in advance from your appointing authority that the financial interest is not so substantial as to be deemed likely to affect the integrity of your services to the Town. Unless and until you receive this exemption, you must abstain from any participation in the promulgation of water and sewer regulations for the Town.^{9/}

DATE AUTHORIZED: September 14, 1993

¹“Municipal employee,” a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis, but excluding (1) elected members of a town meeting and (2) members of a charter commission established under Article LXXXIX of the Amendments to the Constitution. G.L. c. 268A, §1(g).

²“Participate,” participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, §1(j).

³“Particular matter,” any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

⁴Examples cited by the Court are every taxpayer’s interest in the school budget for his town, every town employee’s interest in every town expenditure, and the interest of school children and their parent in school services.

⁵Section 19(b)(3) provides an exemption, “if the particular matter involves a determination of general policy and the interest of the municipal employee or members of his immediate family is shared with a substantial segment of the population of the municipality.”

⁶In *EC-COI-92-34*, we noted that certain matters of general policy may not be particular matters for purposes of G.L. c. 268A. That precedent is wholly consistent with our ruling in *EC-COI-81-34* that regulations themselves are not particular matters. Nothing in *EC-COI-92-34*, however, persuades us that we must now depart from our longstanding precedent that the process leading to the adoption of general policy contained in a regulation is a particular matter.

⁷In *EC-COI-92-34*, our concern was that while the residential factor affected all commercial property owners, the opinion requester owned a significantly higher percentage of the Town’s commercial property. Therefore, the degree to which the residential factor affected the requester’s interest was greater than the remainder of the class of commercial property owners.

⁸In *92-34*, we held that 10% of a town’s population would constitute a “substantial segment.” The Town’s population, according to the 1990 census, is 33,836. G.L. c. 4, §7(41) (“population” as used in the General Laws, means the number of residents counted in the most recent census). Were we to apply a 10% standard here, we would have to be presented with evidence that the Town has 3,383 or more owners of construction-related businesses in order for us to conclude that the regulations affecting such business owners as a class affect a substantial segment of the Town’s population.

⁹Should you obtain an exemption under §19(b)(1), you are advised that you must continue to guide your conduct in accordance with the principles of §23. Specifically, Section 23(b)(2) prohibits a public official from using his position to secure an unwarranted privilege of substantial value which is not properly available to similarly situated individuals. Thus, §23(b)(2) requires that you apply objective standards in any decision concerning the proposed regulations, without regard to your personal interest in the matter. *See EC-COI-89-23; 89-3.*